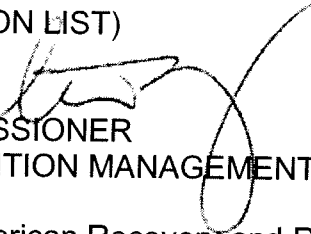


June 3, 2009

FAS INSTRUCTIONAL LETTER 2009-03

MEMORANDUM FOR ALL FAS ACQUISITION ACTIVITIES (QV DISTRIBUTION LIST)

FROM: STEVEN J. KEMPF 
ASSISTANT COMMISSIONER
OFFICE OF ACQUISITION MANAGEMENT (QV)

SUBJECT: Application of the American Recovery and Reinvestment Act of 2009 (Recovery Act) to the Federal Supply Schedules Program and other FAS Acquisition Vehicles

1. Purpose. The purpose of this Instructional Letter (IL) is to provide guidance regarding implementation of Public Law, 111-5, the American Recovery and Reinvestment Act of 2009 (Recovery Act) in Federal Supply Schedules and other GSA/FAS acquisition vehicles.

2. Background. On February 17, 2009, the President signed Public Law 111-5, the Recovery Act. The Recovery Act imposes a number of requirements on Executive Branch departments and agencies receiving Recovery Act funds, in order to meet the broader goals and objectives of the Act; i.e., job creation, economic benefit, and unprecedented levels of transparency and accountability. On February 19, 2009, the Office of Management and Budget (OMB) issued Memorandum M-09-10, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," and supplemented it with M-09-15, "Updated Implementing guidance for the American Recovery and Reinvestment Act of 2009," dated April 3, 2009, to provide standard processes for spending and overseeing Recovery Act funds.

Five Federal Acquisition Regulation (FAR) interim rules were published in the Federal Register on March 31, 2009, as FAC 2005-32. A technical amendment to FAC 2005-32 was published in the Federal Register on May 14, 2009. The interim rules provide authorities, policies, and procedures for governmentwide implementation of the Recovery Act and special contract provisions in the OMB Guidance. The interim rules, identified in Section 6-Reference to Regulations-below, prescribe FAR solicitation provisions and contract clauses that are applicable to Federal Government contracts using Recovery Act funds.

On April 9, 2009, GSA's Office of the Chief Acquisition Officer (OCAO) issued GSA Acquisition Letter V-09-01, "American Recovery and Reinvestment Act Implementation," and on May 18, 2009, GSA's OCAO issued supplement number 1 to the Acquisition Letter. The Acquisition Letter provides all GSA contracting activities awarding and administering contracts and orders with guidance regarding implementation of the Recovery Act.

FAS anticipates receiving Recovery Act funds, and, in accordance with OMB and OCAO guidance, must begin planning and implementing the necessary actions to meet the accelerated time frames and other unique challenges posed by the Recovery Act.

3. Effective Date. Date of signature.

4. Termination Date. This IL expires one year from the effective date unless cancelled, extended, or incorporated into a handbook.

5. Applicability. This IL applies to all GSA/FAS acquisition activities awarding and administering Federal Supply Schedule contracts, Governmentwide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and Indefinite Delivery, Indefinite Quantity (IDIQ) contracts. The IL also applies to Department of Veterans Affairs (VA) acquisition activities awarding and administering Federal Supply Schedule contracts.

6. Reference to Regulations. This IL references GSA Acquisition Letter V-09-01, "American Recovery and Reinvestment Act Implementation," OMB Memorandum M-09-15, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009," and the following FAR Interim Rules, published in FAC 2005-32:

- FAR Case 2009-008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)-Buy American Requirements for Construction Material;
- FAR Case 2009-009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)-Reporting Requirements;
- FAR Case 2009-010, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Publicizing Contract Actions;
- FAR Case 2009-011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--GAO/IG Access; and
- FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Whistleblower Protections.

GSA's website, www.gsa.gov/recovery, also contains GSA policies and procedures pertaining to the Recovery Act.

7. Instructions/Procedures. The following instructions/procedures apply to all clause changes delineated below. FAC 2005-32 applies to solicitations issued and contracts awarded on or after its effective date.

A. Federal Supply Schedules.

- i. Refresh all Federal Supply Schedule solicitations and modify all Schedule contracts to incorporate the following clauses for Recovery Act implementation:
 - FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (MAR 2009). This clause is incorporated by reference in FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items, and flows down to subcontracts. The clause is Required.
 - FAR 52.204-11, American Recovery and Reinvestment Act--Reporting Requirements (MAR 2009). This clause is incorporated by reference in 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items. The clause is Required.
 - FAR 52.212-4, Contract Terms and Conditions--Commercial Items (MAR 2009) DEVIATION (Feb 2007), and Alternate I (Oct 2008) DEVIATION (Feb 2007). This clause is Required; Alternate I is Required as Applicable.
 - FAR 52.212-5, Contract Terms and Conditions Required to Implement

Statutes or Executive Orders--Commercial Items (MAY 2009) (Alternate II - May 2009). This clause is Required. **NOTE: The basic clause and Alternate I do NOT apply to Schedule contracts.**

Solicitation Refresh: FAS acquisition activities awarding and administering Federal Supply Schedule contracts shall immediately prepare a refresh to all Schedule solicitations either in the Solicitation Writing System (SWS) or manually to incorporate the Recovery Act clauses. The posting of the refreshed FAS Schedule solicitations in Federal Business Opportunities (FBO) shall occur on June 15, 2009. This is necessary to coincide with the refreshing of all FAS Schedule solicitations with the release of applicable system changes to facilitate orders being placed against Schedule contracts that are funded, in whole or in part, by the Recovery Act. The VA National Acquisition Center shall refresh its Schedule solicitations to incorporate Recovery Act clauses within a reasonable period of time. In addition to the inclusion of Recovery Act clauses, the refresh may include non-Recovery Act clauses. Solicitations refreshed in SWS will automatically include all clause updates that have occurred since the previous refresh.

In-house Schedule Offers: Schedule offers received prior to the solicitation refresh to include the applicable Recovery Act clauses shall execute a solicitation amendment to incorporate the current clauses into the awarded contract. When deciding to accept the amendment, each offeror shall have the opportunity to accept or reject the Recovery Act clauses. The decision regarding acceptance of the Recovery Act clauses shall determine whether the Schedule contractor is eligible to receive Schedule orders funded, in whole or in part, by the Recovery Act.

Recovery Act Contract Modification-FAS: On June 15, 2009, a program-wide mass modification, to include only the Recovery Act clauses, shall be issued. Schedule contractors shall be given the opportunity to accept or reject the Recovery Act mass modification. In the event that the contractor refuses to accept the modification, the contractor shall not be eligible for receipt of Schedule orders funded, in whole or in part, by the Recovery Act.

Recovery Act Contract Modification-VA: The VA National Acquisition Center shall use their current process to issue a modification to existing Schedule contracts to include only the Recovery Act clauses. The VA National Acquisition Center will periodically provide data to FAS through an automated interface on those VA Schedule contracts that have accepted the Recovery Act clauses.

Additional Schedule Refresh Contract Modification-FAS and VA: Following the FAS Recovery Act mass modification and the VA Recovery Act modification, FAS and VA acquisition activities awarding and administering Schedules shall issue an additional schedule refresh modification for each Schedule solicitation, to incorporate all other changed/updated terms and conditions that were included in the refreshed Schedule solicitation. FAS solicitations refreshed in SWS will automatically generate the content of the mass modification, including the Recovery Act clauses. FAS Business Portfolios that intend for the FAS Supplier Management Division to process the additional Schedule refresh modification through the mass modification process must coordinate the timelines of this

Schedule refresh modification with Supplier Management through the usual procedures.

Schedule contractors will be required to either accept or reject the Recovery Act mass modification before they can accept or reject the individual Schedule refresh mass modification. Those vendors that have rejected the Recovery Act mass modification can still accept the individual Schedule refresh mass modification, without agreeing to the Recovery Act clauses. If the Schedule contractor rejected the Recovery Act mass modification, but accepts the individual Schedule refresh mass modification, the modification will automatically note that the modification is exclusive of the Recovery Act clauses.

Note: FAS and VA Contracting Officers shall not accept any exceptions/deviations to, or tailoring of, Recovery Act clauses.

ii. Customer Identification of Federal Supply Schedule Contractors in Compliance with Recovery Act.

System Changes: In conjunction with the FAS Office of the Chief Information Officer, the FAS Office of Acquisition Management will implement system changes on June 15, 2009 to FAS internal systems SWS, eOffer/eMod, the Offer Registration System (ORS), and FSS Online, to capture whether each contract includes Recovery Act clauses and system changes to FAS external customer facing systems GSA Advantage!®, GSA eLibrary, and e-Buy--to display to ordering activities which contracts CONTAIN Recovery Act clauses.

"ARRA" Icon: Schedule contractors that have agreed to accept Recovery Act clauses-at time of award, as a result of the FAS Recovery Act mass modification, or as a result of the VA Recovery Act modification-will be identified in FAS external customer facing systems-GSA Advantage!®, GSA eLibrary, and e-Buy--by the "ARRA" icon.

The "ARRA" icon will enable ordering activities to easily identify those Schedule contractors eligible to receive Recovery Act funds; i.e., those contractors that have agreed to the incorporation of Recovery Act clauses in their contracts, and may, therefore, receive orders funded, in whole or in part, by the Recovery Act.

For VA Schedule contracts, the displaying of the "ARRA" icon will be based upon periodic data feeds to FAS on those contractors that have accepted the Recovery Act clauses through an automated interface established between the VA and FAS.

iii. Customer Education.

To educate ordering activities and contractors as to how they may effectively utilize Recovery Act funds through the use of Schedule contracts, and to facilitate compliance with the new regulations, FAS plans to provide Recovery Act information on the GSA Schedules website at www.gsa.gov/schedules. A number of e-Tools, including GSA Advantage!®, GSA eLibrary, e-Buy, and the Vendor Support Center (VSC) will also be updated to provide additional information on the applicability of Recovery Act requirements to the Schedules Program.

B. GWACs, MACs, and IDIQ Contracts.

- i. The following Recovery Act clauses shall be added to all GWAC, MAC, and IDIQ solicitations and contracts:
 - FAR 52.203-15, Whistleblower Protection Under the American Recovery and Reinvestment Act of 2009 (MAR 2009)
 - FAR 52.204-11, American Recovery and Reinvestment Act--Reporting Requirements (MAR 2009)
 - FAR 52.244-6, Subcontracts for Commercial Items (MAR 2009)
 - FAR 52.215-2, Audit and Records--Negotiation (MAR 2009) Alternate I (Mar 2009)
- ii. With the issuance of this IL, FAS Contracting Officers shall modify existing GWAC, MAC, and IDIQ contracts to include Recovery Act clauses for future orders, if Recovery Act funds will be used. Existing task orders shall be modified to include Recovery Act clauses, if it is anticipated that Recovery Act funds will be used. Should a contractor refuse to accept the Recovery Act modification, the contractor shall not be eligible for the receipt of Recovery Act funds.
- iii. FAS GWACs, MACs and IDIQ contract websites at www.gsa.gov shall identify contracts that include Recovery Act clauses.

C. Updates to IL

The FAS Office of Acquisition Management may issue further guidance, as necessary, concerning the Recovery Act. This IL may be supplemented as additional guidance becomes available regarding implementation of the Recovery Act.

8. Questions and Answers.

A. General Questions and Answers

Where should contractors go to obtain guidance regarding contractor reporting requirements prescribed in FAR 52.204-11, American Recovery and Reinvestment Act--Reporting Requirements?

Contractors will report the information, using the online reporting tool available at www.FederalReporting.gov (currently under construction) using instructions at that website.

Who is responsible for ensuring that contractors comply with FAR 52.204-11, American Recovery and Reinvestment Act-- Reporting Requirements (MAR 2009)?

Although FAR 52.204-11 is being incorporated at the contract level, ordering Contracting Officers are responsible for obligating Recovery Act funds through task and delivery orders. Therefore, ordering Contracting Officers are in the best position to ensure compliance with the clause. The ordering Contracting Officer shall be responsible for ensuring that contractors comply with the reporting requirements in support of that order. If a contractor fails to comply with Recovery Act reporting requirements, and this information is reported to the contract level Contracting Officer, then the contract level Contracting Officer should take

appropriate contractual action to address noncompliance.

If the contractor is taking exception to the Recovery Act clauses, can I negotiate and tailor the terms and conditions of the Recovery Act clauses into the contract?

No. Contracting Officers shall **not** accept any exceptions/deviations to, or tailoring of, Recovery Act clauses.

Does the implementation of the Recovery Act require additional preaward and post award requirements for posting on Federal Business Opportunities (FedBizOpps)?

Yes. There are both unique preaward and post award requirements to FedBizOpps. See GSA Acquisition Letter V-09-01, Section 7D, Reporting Requirements, for guidance on those requirements.

Are there additional data entry requirements for Federal Procurement Data System (FPDS) for task and delivery orders or for the establishment of Schedule Blanket Purchase Agreements (BPAs)?

There are unique requirements for entering Recovery Act funded award data into FPDS. See GSA Acquisition Letter V-09-01, Section 7D, Reporting Requirements, for guidance on those requirements. In addition, for FAS unique requirements on entering Recovery Act funded awarded data into FPDS see FAS Office of the Controller, Memorandum, titled American Recovery and Reinvestment Act of 2009: Operational Policy and Procedures for Tracking and Reporting of ARRA Activities, dated April 14, 2009.

B. Federal Supply Schedule Questions and Answers.

Can the Schedule Contracting Officer modify individual Schedule contracts to include the Recovery Act Clauses prior to June 15, 2009?

Yes, Schedule Contracting Officers can modify individual Schedule contracts to incorporate the Recovery Act clauses prescribed in this IL prior to June 15, 2009. However, for that Schedule contractor to be identified that their contract contains the Recovery Act clauses in FAS external customer facing systems-GSA *Advantage!*®, GSA eLibrary, and e-Buy--by the "ARRA" icon, that Schedule contractor must reaccept the Recovery Act clauses through the Recovery Act mass modification on or after June 15, 2009.

Do existing Blanket Purchase Agreements (BPAs) against Schedule contracts need to be modified to include the Recovery Act Clauses?

If orders against existing BPAs will be funded, in whole or in part, by the Recovery Act, Contracting officers shall modify existing BPAs to include the Recovery Act clauses prescribed in this IL into those BPAs. In the event a contractor refuses to accept such a modification, orders against that BPA shall not be eligible for receipt of Recovery Act funds.

Existing BPAs that include a Schedule contract flow down provision would not need to be modified if the Schedule contract includes the Recovery Act clauses because the Recovery Act clauses at the Schedule contract level would apply to those orders issued against the BPA, if the order was funded, in whole or in part, by the Recovery Act.

My solicitation contains the Special Item Number (SIN) for Ancillary Repair and

Alteration (R&A). Do I need to include the clauses prescribed in FAR Case 2009-008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)--Buy American Requirements for Construction Material?

No. Ancillary R&A services are solely associated with the repair, alteration, delivery or installation of supplies and/or services acquired under the same Schedule, and are routine and noncomplex in nature. Ancillary Repair and Alteration SINs exclude major or new construction of buildings, roads, parking lots, and other facilities, complex repair and alteration of entire facilities, or significant portions of facilities, and Architect-Engineer (A/E) services. However, depending on the requirement, the ordering Contracting Officer may decide to add applicable clauses from FAR Case 2009-008 at the ordering level for BPAs or orders that include ancillary R&A services.

Are BPAs and orders established under Schedule contracts considered competitive for purposes of reporting rationales under the Recovery Act?

BPAs and orders established in accordance with the Schedule ordering procedures in FAR 8.405-1 and 8.405-2 are considered to be competitive. BPAs and orders established in accordance with FAR 8.405-6, for limited sources, are **not** considered to be competitive for purposes of reporting rationales under the Recovery Act.

What effect does the Recovery Act have on GSA's Schedule State and Local Programs?

To accept Schedule orders funded, in whole or in part, by the Recovery Act from eligible state or local ordering activities Schedule contractors are required to accept the Recovery Act clauses, the order must be within the scope of one of the currently approved GSA Schedule State and Local Programs (Cooperative Purchasing, Disaster Recovery Purchasing or 1122 CounterDrug Program), and for the Cooperative Purchasing and Disaster Recovery Programs the Schedule contractor must have elected to participate in that Program.